culative comparisons; and it must be confessed there are some cogent reasons against such a course. It enables the parties to select signatures suited to their ends rather than those of truth and justice: 1 Greenl. Ev. §§ 578 *et seq.*, *Doe* v. *Suckermore*, 5 Ad. & Ellis 703, 731, and other cases cited by Mr. Greenleaf.

I. F. R.

Supreme Court of Errors of Connecticut.

LINCOLN *v.* McCLATCHIE.

The defendant in the month of March put into the hands of the plaintiff, a real-estate broker, for sale, a house in a certain city street, at the price of $6500; the plaintiff to receive a commission of 1 per cent. if he sold the house, the defendant to have the right to sell it himself without being liable to a commission, and the plaintiff not to advertise. The plaintiff entered the house on his books, and in December and January following advertised houses for sale on that street. G., who lived on the street and was desirous of finding a house near by for a friend, saw the advertisement and went to the plaintiff's office and learned that the defendant's house was for sale. He informed his friend, and the latter went to the defendant and negotiated with him for it and finally purchased it. The purchaser did not see the plaintiff nor go to his office, and G.'s action in the matter was wholly voluntary: *Held* that the plaintiff was entitled to his commission.

A sale made by the defendant, upon which the plaintiff was to have no commission, held to mean a sale to a purchaser found by the defendant wholly without the plaintiff's procurement.

The plaintiff, by some misunderstanding, had altered the entry of the price on his books from $6500 to $6000, and gave the latter price to G. when he inquired. The defendant's price remained $6500, and he sold the house for $6400: *Held* that the plaintiff was still entitled to his commission.

ASSUMPSIT, to recover a commission for the sale of real estate, claimed to be due to the plaintiff as a real-estate broker; brought to the Superior Court in Hartford county. The following facts were found by an auditor to whom the case was referred:

On the 14th of March 1866, the defendant left with the plaintiff, a real-estate broker in the city of Hartford, upon sale, a certain piece of real estate, with house and buildings, upon Canton street, in Hartford. The plaintiff was instructed not to advertise the place, but was to sell it at private sale for $6500, and in case of such sale he was to receive 1 per cent. as a commission. The defendant was to have the right to sell it himself, and in that case the broker was to have no commission or pay. The plaintiff entered a description of the place, with particulars of price, &c., in his descriptive-book, kept in his office for consul-

tation by his customers. Subsequently the plaintiff reduced the price upon his descriptive-book to $6000, supposing that he had the defendant's consent, which the latter had not in fact given him.

In December 1866, and in January 1867, the plaintiff advertised houses upon Canton street for sale. One Goodwin resided upon Canton street, and had been looking for a house suitable for a friend of his named Burdick. He also took an interest in real-estate matters generally, particularly in his neighborhood. He was attracted by the advertisement to the plaintiff's office, where he learned from the plaintiff that the defendant's house was for sale. The plaintiff gave him $6000 as the price. Goodwin subsequently informed Burdick that McClatchie's house was for sale at $6000. Burdick asked him to look at it and report to him. He did so, and advised Burdick to buy. Burdick then examined the house himself, and soon after entered into negotiation with the defendant personally, which resulted in the defendant's selling to Burdick the place (with a few articles of personal property worth less than $100), for $6500, on the 18th of February 1867. Burdick had no personal intercourse or dealing with the plaintiff. Goodwin's connection with the plaintiff in the matter was voluntary. Goodwin informed Burdick before he purchased that the house was in the plaintiff's hands for sale at $6000.

If upon the foregoing facts the court should be of opinion that the defendant was not legally liable to the plaintiff, the auditor found the defendant not indebted; but if the court should be of opinion that upon the facts the defendant was liable, then the auditor found the defendant indebted to the plaintiff in the sum of $64, with interest from February 18th 1867.

The Superior Court rendered judgment for the defendant, and the plaintiff brought the record before this court by a motion in error.

Hyde and *Jones*, for the plaintiff.

Cole, for the defendant.

PARK, J.—If Burdick, the purchaser, had gone to the office of the plaintiff to ascertain what real estate there was for sale and there obtained all the information that was communicated to

Goodwin, and in consequence thereof had opened a negotiation with the defendant to purchase and had finally purchased the premises, the counsel for the defendant concede that he would have been liable: *Murray* v. *Currie*, 7 Car. & P. 584; *Wilkinson* v. *Martin*, 8 Id. 1; *Burnett* v. *Bouch*, 9 Id. 620.

But the claim is, that the fact that the information that Burdick received was communicated to him by Goodwin, who received it from the plaintiff while he was not acting as the agent of Burdick in procuring it, materially alters the character of the transaction, and renders the defendant not liable to the plaintiff.

It appears that Goodwin was the personal friend of Burdick, and knew that the latter wished to purchase a dwelling-house. His friendship prompted him to search for a suitable place for his friend that was for sale. He saw an advertisement of the plaintiff of houses for sale upon Canton street, and went to his office for information about them. He there learned that the defendant had a house for sale, and was told the price. This information he communicated to Burdick, and informed him that the house was in the plaintiff's hands for sale. Burdick thereupon requested Goodwin to examine the premises and report to him. Goodwin did so, and advised Burdick to purchase. Burdick then examined the house himself, and soon after entered into negotiation with the defendant to purchase, which resulted in a sale.

Had Burdick in the first instance requested Goodwin to do what was done by him in this transaction, the case would have stood precisely as if Burdick had procured the information himself from the plaintiff, on the principle *qui facit per alium facit per se*, and the defendant in that case would clearly have been liable. Is the case materially different? Goodwin acted for Burdick in procuring the information. He did not casually obtain it, but went to the office of the plaintiff to ascertain what intelligence he had to disclose. Burdick acted upon the information when communicated to him by Goodwin, knowing from what source it had been obtained. He adopted the acts of Goodwin, which was equivalent to a previous request to perform the acts. The plaintiff was pursuing the business of a broker in giving the information, and Goodwin received it for Burdick in the capacity of a messenger and conveyed it to him. Suppose Goodwin had informed the plaintiff for what purpose he inquired, and the

information had been given for the purpose of being communicated to Burdick, would the case for the plaintiff have been stronger? The information was given in order to procure a purchaser, and can the fact that Goodwin did not make known for whom he was acting make any material difference, when his act operated directly to bring the buyer and seller together? They show that the plaintiff was the procuring cause of the sale, as much as would have been the case if Goodwin had made known his business, or Burdick had gone in person to the office of the plaintiff and obtained the information himself.

The defendant further claims that he specially reserved the right to sell the property himself, without being liable to pay a commission to the plaintiff. We think the proper construction of the understanding was, that the defendant should have the right to sell to a purchaser found by him independently of the plaintiff's procurement.

For these reasons we think there is manifest error in the judgment complained of.

In this opinion the other judges concurred.

The foregoing opinion seems to us extremely valuable by reason of its handling of a very common and sometimes perplexing question in a very just and common-sense manner. There seem, as we might naturally expect perhaps, to be two extreme views in regard to commissions being due brokers, agents, or factors, for the sale of commodities, and especially of real estate. We mean now, of course, in those cases where no special contract or custom exists, which might control the same.

1. It seems by those in the interest of the brokers, to be supposed in the absence of all special customs or contracts, that, where a broker is employed to negotiate a sale, for which he is to receive a specified or customary commission, that the commissions are earned the moment the property is committed to the broker for sale, and that the owner can have no control over the property thereafter, either to withdraw it or to make sale of it himself, without first paying the broker his commission, certainly not unless he specially reserves such right.

2. Those in the interest of the vendors seem to suppose the broker has no right to any kind of recompense for all he may do or pay, by way of inviting or negotiating a sale, unless he actually consummates it.

The truth seems to lie between these extremes, and in the precise line indicated in the opinion. The broker may pursue his own mode in finding a purchaser; and there is, probably, an implied understanding, that if the vendor shall withdraw his property or effect a sale solely on his own account, he may do so, but in that event he may be bound to reimburse any expense the broker may have incurred by advertising or otherwise. But unless he contributed to the sale made by the owner of the property he is not entitled to commis-

sions. Commissions, *eo nomine*, can only be earned by a complete sale; the same as freight is the mother of wages, and the completing of the voyage, under ordinary circumstances, is required in order to demand freight.

But if the efforts of the broker in fact procure the purchaser, even where the bargain is made with the owner, and without his knowing of the fact that the action of the broker procured the purchaser, nevertheless, upon that fact being disclosed, nothing can be more reasonable or just than that the broker should receive commissions: *Durkee* v. *Vermont Central Railway*, 29 Vt. 127. But if the broker find a purchaser at the price required and the owner refuse to sell, the broker will be entitled to claim full commissions: *Kock* v. *Emmerling*, 22 How. U. S. 69; *Bailey* v. *Chapman*, 41 Mo. 536. So also where the sale fails through defect of title: *Doty* v. *Miller*, 43 Barb. 529; *Topping* v. *Healey*, 3 F. & F. 325.

I. F. R.

Circuit Court of the United States, Southern District of Georgia.

HARVEY W. LATHROP *v.* DAVID M. BROWN.

A state statute providing that in all suits founded on any debt or contract made prior to 1865 or in renewal thereof, the plaintiff should not have a verdict or judgment until he had made it clear to the tribunal trying the same, that all legal taxes chargeable by law upon the same had been duly paid for each year since the making of the debt or contract; and that the giving in of the debt for taxation and payment of the taxes should be a condition precedent to a recovery, is unconstitutional, as far at least as regards debts or contracts made before its passage.

On demurrer. The facts are stated in the opinion.

Harden & Levy, for plaintiff.

A. W. Stone, for defendant.

Bradley, J.—This is an action brought by Harvey W. Lathrop, a citizen of Maryland, against David M. Brown, upon a promissory note dated January 1st 1862, whereby one Jacob L. Riley, as principal, and Brown as surety, promised by the 1st of January, then next, to pay John J. McLeod, or bearer, $2280.50 for value received. Two thousand dollars were paid on the note December 8th 1865. The suit is brought for the balance. The defendant, amongst other things, pleads that the contract was made prior to 1st of June 1865, and that by a statute of Georgia of 13th of October 1870, it was enacted that in all suits brought in or before any court of the state founded on any debt or contract made before the 1st of June 1865, or in renewal thereof, it should